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IS THE PRESIDENT OF THE UNITED STATES VESTED WITH AUTHORITY UNDER THE CONSTITUTION TO APPOINT A SPECIAL DIPLOMATIC AGENT WITH PARAMOUNT POWER WITHOUT THE ADVICE AND CONSENT OF THE SENATE?[1]

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The executive power of the United States is vested in the President who "shall nominate and by and with the advice and consent of the Senate appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution of the United States. Congress at its discretion may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. (Const. U. S., Art. II, § 2, 2.)

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties. . . . His duties are continuing and permanent, not occasional or temporary. They are such as his superior in office should prescribe:" U. S. *v.* Hartwell, 6 Wall. 393.

[1] This article is a reply to one by Henry Flanders, Esq., in the March number of the AMERICAN LAW REGISTER AND REVIEW, p. 177.

"The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed not only in making appointments but in all that is incident thereto:" U. S. *v.* Perkins, 116 U. S. 485. In U. S. *v.* Germaine, 99 U. S. 511, Justice MILLER said: "In the case before us the duties are not continuing and permanent and they are occasional and intermittent," whence it followed that the person was not an officer and his employment was not an office in contemplation of law. Chief Justice MARSHALL in Little et al. *v.* Barrieme et al., 2 Cranch, 170, decided in the February term, 1804, said: "The instructions cannot change the nature of the transaction, or legalize an act, which, without those instructions, would have been a plain trespass;" the case involving the actions of a commander of a ship of war of the United States obeying his instructions from the President of the United States. The commander acts at his own peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured by the execution.

Diplomatic officers shall be deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, charges d'affaires, agents, and secretaries of legation, and none others. (Revised Statutes, 1674.)

To entitle any charge d'affairs, or secretary of legation or embassy to any foreign country, or secretary of any minister plenipotentiary, to compensation, they shall respectively be appointed by the President, by and with the advice and consent of the Senate. (Revised Statutes, 1684.)

No diplomatic or consular officer shall correspond in regard to the public affairs of any foreign government with any private person, newspaper, or other periodical, or otherwise than with the proper officers of the United States. (Revised Statutes, 1751.)

From these data it is possible to determine exactly what is signified under the Constitution and laws of the United States by the term "officer" and "diplomatic officer."

On the seventh of March, 1894, President Cleveland sent

Hon. James H. Blount, of Georgia, to the Sandwich Islands, and four days later the Department of State issued to Mr. Blount his instructions and commission of which the following is part:

"The comprehensive, delicate, and confidential character of your mission can now only be briefly outlined, the details of its execution being necessarily left, in great measure, to your good judgment and wise discretion.

"You will investigate and fully report to the President all the facts you can learn respecting the condition of affairs in the Hawaiian Islands, the causes of the revolution, by which the Queen's Government was overthrown, the sentiment of the people toward existing authority, and, in general, all that can fully enlighten the President touching the subjects of your mission.

"To enable you to fulfill this charge your authority in all matters touching the relations of this Government to the existing or other Government of the Islands, and the protection of our citizens therein, is paramount, and in you alone, acting in co-operation with the commander of the naval forces, is vested full discretion and power to determine when such forces should be landed or withdrawn.

"You are, however, authorized to avail yourself of such aid and information as you may desire from the present minister of the United States at Honolulu, Mr. John L. Stevens, who will continue until further notice to perform the usual functions attaching to his office, not inconsistent with the powers intrusted to you. An instruction will be sent to Mr. Stevens directing him to facilitate your presentation to the head of the Government upon your arrival, and to render you all needed assistance, etc., etc."

Mr. Blount was not appointed by and with the advice and consent of the Senate. President Cleveland appointed him with authority paramount. Was the President authorized, under the Constitution and the laws of the United States, to make such an appointment?

The term paramount is defined in the *Century Dictionary:* "Supreme; superior in power or jurisdiction; chief; as lord

paramount, the supreme lord of a fee, or of lands, tenements, and hereditaments; the highest in rank or importance." Mr. Blount's authority, according to his instructions and commission, out-ranked that of the United States minister at Honolulu, Mr. Stevens, who had been appointed by and with the advice and consent of the Senate.

Has the President authority to send an agent whose authority shall be paramount to that of an ambassador, minister, consul, or charge d'affaires, unless that agent is appointed by and with the advice and consent of the Senate?

The discussion on the adoption of the article which vests the appointing power in the President, by and with the advice and consent of the Senate, began July 21, 1787, and the motion that the judges should be nominated by the Executive and such nominations become appointments unless disagreed to by two-thirds of the second branch of the Legislature, made by Madison three days before, was resumed. "Mr. Madison stated, as his reasons for the motion, first, that it secured the responsibility of the Executive, who would, in general, be more capable and likely to select fit characters than the Legislature, or even the second branch of it, who might hide their selfish motives under the number concerned in the appointment; secondly, that, in case of any flagrant partiality or error in the nomination, it might be fairly presumed that two-thirds of the second branch would join in putting a negative on it. . . . The Executive Magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the United States." On the seventh of September, in the debate on the clause, "He shall nominate, etc., appoint ambassadors, etc.," Mr. Wilson objected to the mode of appointing, as blending a branch of the Legislature with the Executive. Good laws are of no effect without a good executive; and there can be no good executive without a responsible appointment of officers to execute. Responsibility is, in a manner, destroyed by such an agency of the Senate. He would prefer the council proposed by Col. Mason, provided its advice should not be made obligatory on the President.

"Mr. Pinckney was against joining the Senate in these appoint-

ments, except in the instances of ambassadors, who, he thought, ought not to be appointed by the President.

"Mr. Gouverneur Morris said that, as the President was to nominate, there would be responsibility; and as the Senate was to concur, there would be security."

The idea advanced by Morris is undoubtedly the fundamental one in the matter of executive appointments by and with the advice and consent of the Senate. The President is empowered to appoint secret agents, and a contingent fund amounting annually to about $500,000 is placed at his disposal, to enable him to acquire such information as, in his judgment, may seem necessary. The reason for placing such a fund at his disposal likewise places a contingent fund at the disposal of the Senate and of the House of Representatives. As Commander-in-chief of the armies and navies of the United States, the President is empowered to send special agents to any part of the world to make investigation for the President touching matters pending, or likely to be pending, between the United States and another country or people. The nature of the inquiry to be made by such a special agent is described by Webster in his Huselmann note, in which he says of Mr. Mann's errand:

"Mr. Mann's errand was, in the first instance, purely one of inquiry. He had no power to act unless he had first come to the conviction that a firm and stable Hungarian government existed. 'The principal object the President had in view,' according to his instructions, 'is to obtain minute and reliable information in regard to Hungary in connection with the affairs of adjoining countries, the probable issue of the present revolutionary movements, and the chances we may have of forming commercial arrangements with that power favorable to the United States.' Again, in the same paper, it is said: 'The object of the President is to obtain information in regard to Hungary, and her resources and prospects, with a view to an early recognition of her independence and the formation of commercial relations with her.'" (Wharton, Int. Law, Chap. III, 47.)

President Monroe, in 1816, sent Rodney, Bland and Graham

as commissioners to inquire into the condition of several South American colonies. These commissioners were not nominated to the Senate, although that body was in session at the time of their appointment. When the diplomatic appropriation bill came up in the House, Clay excepted the insertion of $30,000 for the payment of these special commissioners, insisting that being diplomatic agents, their nomination should have been sent to the Senate and by the Senate confirmed. The payment was not met out of the contingent fund, but a special appropriation was made under the head of incidental expenses. (Ib.)

These and other precedents have been cited by advocates of the authority of the President to appoint Mr. Blount with paramount power. Upon examination, they cease to be precedents for Mr. Blount's appointment. To the extent that they are precedents for the appointment by the President of an agent to make inquiry, they are precedents for Mr. Blount's appointment; there is no precedent for the appointment of Mr. Blount with paramount power without the advice and consent of the Senate. In every case of the appointment of a special commissioner, or agent, by the President to enter into treaty negotiations, the treaty thus negotiated was merely suggestive and in the nature of information, until it was submitted by the President and ratified by the Senate. No Presidential agent can make a treaty; no Presidential messenger can he constitutionally empowered with paramount authority without the advice and consent of the Senate. Neither the Constitution nor the laws nor the force of custom gives authority to the President for such an appointment as that of Mr. Blount. If the President may appoint a diplomatic agent with paramount power, the office of the Senate in the appointing power is superfluous. What shall restrain a President from appointing such a paramount agent to England, to Germany, or to France, where he shall be superior to the American Ambassador appointed by and with the advice and consent of the Senate? What Ambassador, Minister, Consul, Charge d'Affaires, what Superintendent of the Mint, Collector of the Port, United States Marshal, Federal Judge may not find himself under the authority of a

paramount appointee of the President? Such an appointee may plunge the country into war, may strain commercial relations, may interfere with pending treaties, may ignore, or even defy, the legislation of Congress.

The theory that the President possesses such power of appointment is not supported by any accepted interpretation of the principles on which representative government in this country is founded. The powers delegated to the United States are distributed into three groups, known as the executive, the legislative, and the judicial. Neither of these is independent of the other. In the appointing power, and in the treaty-making power, the President and the Senate must co-operate. Congress alone has the power to declare war. These delicate relations would be dangerously confused were the President suffered to make paramount appointments without the advice and consent of the Senate. Such appointments at once transform the government of the United States into a discretionary monarchy. As Morris said of the office of the Senate in the appointing power, it is for "security."

By the definition of the term "officer" laid down by the Supreme Court, Mr. Blount was not an officer; as he was not nominated to the Senate, nor confirmed by them, he was not an ambassador, public minister, or consul. As an agent sent on a mission of special inquiry by the President he was subject to the protection of the Constitution and the laws of the United States. He possessed no more authority than any secret agent of the government.

The insertion of the word "paramount" in his commission, and his subsequent action in obeyance of the intimations implied by that word; his assumption of authority over the American minister at Honolulu; his ordering down the American flag; his direction of affairs as the actual American minister, were assumptions wholly without precedent in custom, or in law, and without warrant under the Constitution. He was but a ministerial agent and could possess no paramount authority unless that authority was given him by appointment from the President by and with the advice and consent of the Senate. He was not an officer in contempla-